It’s a stupid autonomy…

Jan Komárek 2015-03-14T09:03:56

Risking further escalation of the rhetorical contest over a more catchy title, I would like to comment on Daniel Halberstam’s analysis of the ECJ’s Opinion 1/13 from a wider perspective. I would like to try to challenge the starting assumption which Daniel (and in fact also the commentators who were critical of the Opinion) makes – that the EU has a federal constitutional order, whose autonomy deserves the protection required by the ECJ. It is also because that no matter how much I find Daniel’s technical legal analysis insightful, I do not think the core issue concerns the doctrinal level.

It is true that it was the Member States that put the Court in front of a seemingly irresolvable dilemma: to take the obligation to accede to the Convention seriously (Article 6 (2) TEU) on the one hand, while at the same time requiring that ‘the specific characteristics of the Union and Union law’ are preserved (Protocol No 8) on the other. One can raise a technical argument already here, suggesting that the Protocol does not really mean *all* specific characteristics of EU (including its systemic principles of direct effect and primacy, which guarantee the autonomy of EU law), but is concerned mainly with the division of competences between the EU and the Member States – firstly when it comes to the EU’s participation in the control bodies of the European Convention and secondly as regards their respective standing before the ECHR. But again, a doctrinal argument can be left for a proper legal analysis (which I do not want to attempt in a blog post).

I would like to focus on the autonomy of EU law – which explains, as the title of Daniel’s paper, everything. It may be the case – but does it also *justify* it?

I do not think so. The reason is, well, what is behind the autonomy argument. Structurally, the ECJ seems to understand autonomy in a similar way as national constitutional courts conceive of sovereignty: EU law should reign supreme in its jurisdiction and any encroachment by another authority must be put under the ECJ’s check. This comes in the form of various instruments safeguarding the ECJ a place, which is quite unparalleled to that of any constitutional court of the parties to the Convention. It shall be remembered that the ECJ asked for these safeguards in a ‘discussion paper’, by which it became involved in the drafting process of the Accession Agreement in a way unthinkable in any European constitutional system.

But the analogy between sovereignty and autonomy is limited in that while the state sovereignty underpins a system whereby the constitution and the highest authority that interprets it (usually, but not always, the constitutional court) is embedded in a political system that has at least a plausible (and generally still uncontested) claim to political legitimacy, this is precisely what the EU lacks. The ECJ therefore protects the autonomy/sovereignty of *a system of rules*, whose legitimacy is highly contested. That is also why the strongest claim the ECJ has vis-à-vis other legal systems, is the rule of law, not democracy or people’s self-government (*Kadi* attests to this).

The legitimacy of EU law ultimately depends on the legitimacy of its states (see Fritz Scharpf or Peter Lindseth for a detailed argument, pace Jürgen Habermas or Armin von Bogdandy). If they made their sovereignty subject to the ECHR's control, why not the ECJ?

Daniel's starting assumption about the autonomy of EU law thus contradicts what can be understood as a peculiarly European post-war constitutional achievement: the willingness to put one's own constitutional system under an external check (one can refer to the work of Jan Werner Müller or more recently Alexander Somek here). The example of asylum seekers' treatment by the ECJ, which prioritises the illusion of mutual trust over the rights concerns, is the case in point. It was precisely because the ECHR does not need to worry about these systemic concerns of the EU legal order (the effectiveness of the Common European Asylum System) that the Convention rights were eventually taken seriously – also by the ECJ.

Here I do not quite understand what Daniel makes of the 'hydraulic connection' between the three conditions of federal stability (1. 'a reasonably common set of values and similar level of fundamental rights protection throughout the Union', 2. 'the Union's ability to remedy rights violations in component states effectively whenever they occur' and 3. 'a safety valve for a component state to invoke overriding policy justifications where compliance with mutual trust would otherwise rip the Union part').

Daniel suggests that

> where one or more of these elements is weak, the remaining element(s) must be correspondingly strong. For example, if there are serious divergences in fundamental rights protections, and the Union does not have the power to step in protect individuals, it must relax the obligation of mutual trust. For a federal union to survive, any legal obligation of mutual trust must be grounded in social reality, not judicial fiat.

In my view the ECJ does the exact opposite: there seems to be a serious problem with respecting fundamental rights of asylum seekers in some Member States, while the Union is not able – *in social reality* (despite all talks of solidarity) – to address them. It is not clear to me how the ECJ's insistence on the strong legal obligation of mutual trust can change this reality. If anything, the ECHR's involvement makes sure that it is the common European (albeit not Union's) standard that allows individual states to depart from their legal obligation of mutual trust.

Finally, few words about whether the ECJ takes 'fundamental rights seriously'. I think Daniel is exactly right when he argues that too much has been made of the ECJ President's statement that the ECJ 'is not a human rights court'. I would add to Daniel's point sonly that not only the ECJ, but also the EU is not *primarily* about human rights. Its human rights are parasitic on other goals of the EU – for a long time market integration, now also collective security.

This shapes *the content* of human rights guaranteed by the EU. It would require a much longer argument to prove that while the ECHR (and national bills of rights) are

embedded in a post-war liberal democracy, that balances people's political freedom with the freedom of the market, the EU's legal order gives priority to the latter. In my view the accession to the ECHR could give some hope that this would change. But that is also the reason why it is currently unlikely – and the ECJ gives a good excuse to the Member States not to do anything about it.
